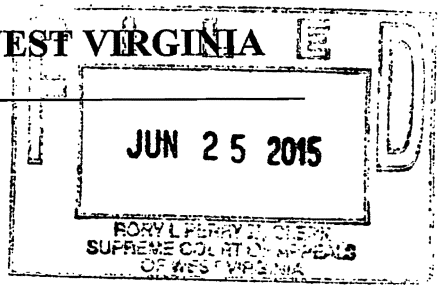
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



TOUGH MUDDER, LLC; PEACEMAKER NATIONAL TRAINING CENTER, LLC; GENERAL MILLS, INC.; and GENERAL MILLS SALES, INC.;
Defendants/Petitioners,

v. No. 15-0114

MITA SENGUPTA, as Personal Representative of The Estate of Avishek Sengupta,
Plaintiff/Respondent.

AIRSQUID VENTURES, INC. (D/B/A AMPHIBIOUS MEDICS); and TRAVIS PITTMAN;
Defendants/Petitioners,

v. No. 15-0123

MITA SENGUPTA, as Personal Representative of The Estate of Avishek Sengupta,
Plaintiff/Respondent.

RESPONDENT MITA SENGUPTA'S CONSOLIDATED OPPOSITION BRIEF

Robert P. Fitzsimmons (WV Bar 1212)
Clayton J. Fitzsimmons (WV Bar 10823)
FITZSIMMONS LAW FIRM PLLC
1609 Warwood Avenue
Wheeling, WV 26003
Tel.: 304-277-1700
Fax: 304-277-1705
bob@fitzsimmonsfirm.com
clayton@fitzsimmonsfirm.com

Robert J. Gilbert (Admitted *Pro Hac Vice*)
Edward J. Denn (Admitted *Pro Hac Vice)*
GILBERT & RENTON LLC
344 North Main Street
Andover, MA 01810
Tel.: 978-475-7580
Fax: 978-475-1881
rgilbert@gilbertandrenton.com
edenn@gilbertandrenton.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes

Rules

Other Materials

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS

Now comes Plaintiff/Respondent Mita Sengupta, as Personal Representative of the Estate of Avishek Sengupta, by and through her counsel, Robert P. Fitzsimmons and Clayton J. Fitzsimmons of the Fitzsimmons Law Firm PLLC, and Robert J. Gilbert and Edward J. Denn of Gilbert & Renton LLC, who hereby request that this Honorable Court affirm the Circuit's "Order Denying Defendants' Motions to Compel Arbitration and Granting Plaintiff's Motion to Declare Arbitration Clause Unenforceable" dated January 9, 2015.[1]

I. ASSIGNMENTS OF ERROR

In these consolidated appeals, the assignments of error asserted by Defendants/Petitioners distill to one question: Whether the Circuit Court properly denied enforcement of Defendants' arbitration clause through the application of ordinary principles of West Virginia contract law?[2]

II. STATEMENT OF THE CASE

A. Introduction

The Arbitration Clause in this case is buried in a complex set of documents presented to Avishek Sengupta just before his drowning at a man-made obstacle event called "Tough Mudder." The Arbitration Clause violates several established principles of West Virginia contract law, two of which stand out. First, the Arbitration Clause is void for unconscionability, both procedural and substantive. ***Procedural unconscionability*** arises in numerous ways:

---

[1] For the sake of consistency and simplicity, Plaintiff/Respondent is referred to as "Plaintiff," and Defendants/Petitioners are referred to as "Defendants," throughout the body of this brief.

[2] In fact, at oral argument in the Circuit Court, Defendants conceded that the "central focus" of the parties' dispute is whether "there's some reason why, under state court principles, the [arbitration clause] should not be enforced." [Transcript, App. 746]. In this consolidated appeal, Plaintiff therefore submits a consolidated argument/assignment of error which subsumes and responds to each of Defendants' assignments of error.

- The circumstances of the Arbitration Agreement's execution bordered on fraud. Tough Mudder claims that Mr. Sengupta went on-line before the event to review the agreement, which provided for a judicial forum in his home state of Maryland. However, when he showed up on the day of the event (a Saturday morning in a rural location), just steps from the starting line and moments before the event was to begin, Tough Mudder handed Mr. Sengupta a materially different agreement depriving him of the promised forum in his home state of Maryland. This is a classic bait-and-switch that would unavoidably influence a reasonable layperson to enter into an arbitration agreement under false assumptions.

- The Arbitration Agreement is rife with ambiguous and internally contradictory language. Mr. Sengupta was required to initial a "Venue and Jurisdiction" clause promising that all legal actions would be heard in "the appropriate state or federal court." But buried behind two legalistic clauses, as the fourth of several "other" provisions, Tough Mudder inserted a conflicting Arbitration Clause. Not only is the clause buried deep in the document, but it is printed in seven-point font. Worse, after requiring his initials next to the clause promising a judicial forum for all legal action, Tough Mudder did not require Mr. Sengupta to initial or otherwise acknowledge that he was aware of the contradictory Arbitration Clause.

Because of the deceptive manner in which Tough Mudder presented the Arbitration Clause, Defendants have failed to establish the fundamental "meeting of the minds" required to prove that the parties formed a binding agreement to arbitrate.

The Arbitration Agreement is also ***substantively unconscionable***, for several reasons. Most importantly, the contract is non-mutual; only Mr. Sengupta is required to arbitrate. In a nearly identical case, the Fourth Circuit invalidated an arbitration agreement set forth in a similarly non-mutual contract. *See Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 609-10 (4th Cir. 2013). In addition, the Arbitration Agreement creates a substantial barrier to relief by imposing enormous arbitration fees and hourly arbitrator costs on participants and their surviving family members; the *minimum* amount that Mrs. Sengupta would need to pay AAA exceeds $10,000, not including her share of the arbitrator's hourly fees. Our courts have struck down contract provisions imposing far smaller burdens on litigants. Finally, the Arbitration Clause is part of an overall remedies structure in the Agreement that requires participants and their families to

indemnify Tough Mudder and all other defendants for the very costs and damages caused by defendants' grossly negligent conduct. In a word, the arbitration remedy is *illusory*. Thus, the Circuit Court correctly invoked the unconscionability doctrine to strike the Arbitration Clause.

Second, the Arbitration Clause offends long-established West Virginia public policy by precluding judicial scrutiny of conduct in violation of public safety and general welfare statutes. Unlike classic outdoor recreational activities like skiing and white-water rafting, Tough Mudder events are entirely artificial and man-made, involving manufactured obstacles not found in nature. Tough Mudder events (and the man-made structures that are integral to those events) therefore must comply with a host of important health and safety regulations that protect the general safety of West Virginia citizens and visitors. Just as our courts have invalidated other contractual provisions (such as anticipatory releases) that preclude judicial enforcement of such regulations, so too should the Supreme Court reject Tough Mudder's attempt to prevent judicial scrutiny of its for-profit activities in violation of at least three critical health and safety regulations.

Thus, the Circuit Court properly denied Defendants' motions to enforce the Arbitration Clause. Defendants now seek refuge in what they mischaracterize as an "emphatic federal policy" favoring arbitration clauses, but no such policy exists in disputes over enforceability. In *Granite Rock Co. v. Teamsters,* 561 U.S. 287, 296-303, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010), the Supreme Court rejected the notion that arbitration clauses merit favorable treatment, reiterating that enforceability is determined under ordinary contract principles.

Here, the Circuit Court refused to enforce the Arbitration Clause, based on ordinary principles applicable to all contracts. This decision was well-reasoned, factually supported and faithful to federal precedent and the decisions of this Court. It should be affirmed.

B. Background Facts

1. The Complaint

Avishek Sengupta drowned at the Walk-the-Plank obstacle, while participating with his employer and co-workers as part of a team at the Tough Mudder Mid-Atlantic event in West Virginia on April 20, 2013. [Complaint, App. 443-77]. The Walk-the-Plank obstacle required participants to ascend onto a crowded and unruly 15-foot platform, and then jump into a man-made pool of cold, muddy water before swimming to the far end and using a cargo net to climb out. *Id.*

Plaintiff Mita Sengupta (Avi's mother and personal representative) filed this case on April 18, 2014, asserting that Avi's death resulted from Defendants' grossly negligent and reckless failure to follow numerous West Virginia public safety laws and private safety standards, as well as Defendants' failure to effectuate a minimally competent rescue or to activate nearby emergency medical personnel to be standing by to render immediate aid. *Id.* Her claims include Count I (Wrongful Death), Count II (Declaratory Relief – Unenforceability of Arbitration Clause), and Count III (Declaratory Relief – Unenforceability of Waiver). *Id.* The Defendants are (1) Tough Mudder, which had primary responsibility for participant safety; (2) Airsquid Ventures (d/b/a Amphibious Medics), which provided safety personnel and services; (3) Travis Pittman, the rescue diver; (4) Peacemaker National Training Center, which hosted the Event; and (5-6) General Mills, which partnered with Tough Mudder to promote and sponsor the Obstacle and Event. *Id.*

The pending appeals concern the Circuit Court's finding under Count II that the Arbitration Clause is unenforceable on grounds including, *inter alia*, ambiguity, no meeting of the minds, non-mutuality, prohibitive costs, elimination of all remedies, and unconscionability.

[Order, App. 1-26]. The Order rejected Defendants' respective motions to enforce the Arbitration Clause, which were heard without the benefit of discovery.[3] [Order, App. 1-26; Motions, App. 27-158].

While some grounds for rejecting the arbitration clause were capable of immediate determination, the trial court reserved judgment on any grounds requiring discovery, such as fraud, lack of full and fair disclosure, and unconscionability in the procurement of the Arbitration Clause. *See Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 395, 729 S.E.2d 217, 230 (2012) (*"Brown II"*) (authorizing discovery to resolve arbitrability issues). [Order, App 6].

2. Plaintiff's Discovery Requests

Shortly after filing her Complaint in April 2014, Mrs. Sengupta served interrogatories and document requests, including discovery directed at the issue of arbitrability, as well as at concealment or misrepresentation of dangers and safety measures that may have induced participants to accept the Arbitration Clause. [App. 212-31].

With their Motion to Compel Arbitration, Defendants asked (and later moved) to stay discovery; and they have never answered any arbitration-related discovery. [App. 694-99]. Thus, Mrs. Sengupta has not received any discovery concerning the circumstances of Avi's review and execution of the Agreement, or of Tough Mudder's marketing strategies and other factors that induced Avi and others to agree to the terms of the Arbitration Clause.

---

[3] The disputed Arbitration Clause is contained in a document entitled "Tough Mudder LLC Assumption of Risk, Waiver of Liability, and Indemnity Agreement Mid-Atlantic Spring 2013" (the "Agreement"), which Defendants contend to have been signed by Avi on the day of the Event. [App. 58-59]. For purposes of this motion, Mrs. Sengupta assumes the authenticity of the copy of the Agreement provided by Tough Mudder. However, she has not yet had an opportunity to conduct full discovery concerning the facts and circumstances of Avi's alleged execution of the Agreement, and thus reserves all rights.

3. Defendants Seek Immediate Determination of Count II (Arbitrability), and Tough Mudder Files for Out-of-State Arbitration

Rather than filing an Answer, Defendants opted to join issue on Count II, filing motions to enforce the Arbitration Clause based on the four corners of the Agreement. Defendants thus stated their willingness to have arbitrability decided on the existing record. [Motions, App. 27-158; Order, App. 6]. Accordingly, at a June 3, 2014 hearing on Mrs. Sengupta's motion for preliminary injunction, the trial court authorized briefing on the issue of arbitrability, without the benefit of formal discovery, to determine if enforceability of the Arbitration Clause could be determined on an expedited basis. *Id.* At that time, Plaintiff reserved discovery rights relating to enforceability if the Court did not deny arbitration on the existing record. *Id.*

In addition, effective April 18, 2014, Tough Mudder (later joined by Peacemaker and the General Mills entities) filed for AAA arbitration to be held outside West Virginia, in Baltimore, Maryland. [App. 63-74, 77-85]. On June 3, the trial court issued a preliminary injunction against that arbitration. [App. 523-33].

4. The Defendants Assert Cross-Claims Against Each Other, but Do Not Seek to Arbitrate Those Claims

Tough Mudder asserted in its arbitration demand that the entity responsible for Avi's death is Airsquid Ventures, LLC (d/b/a Amphibious Medics), which employed so-called "rescue diver" Travis Pittman. [App. 70 at ¶ 22, 84 at ¶ 24] ("Claimants are also immunized from any potential liability to the Senguptas by virtue of ... the intervening, superseding cause arising from the acts and omissions of Amphibious Medics."). Similarly, in their answers to the Complaint in this case, Tough Mudder, Peacemaker and General Mills (on one side) and Airsquid and Travis Pittman (on the other) assert cross-claims for contribution or indemnification against each other. [Docket Sheet, App. 839, Lines 170-201].

However, despite trying to shift responsibility to other Defendants, Tough Mudder did not join Airsquid or Travis Pittman to the AAA arbitration, and neither Airsquid nor Travis Pittman has attempted to join the arbitration. Consequently, a clear risk of inconsistent determinations exists.[4]

5. The Documents Signed by Avi Sengupta, Including the Venue and Jurisdiction Clause and the Arbitration Clause

Because there has been no substantive discovery, little is known about the circumstances surrounding the execution of the two different documents purportedly signed by Avi Sengupta, or about his opportunity (if any) to review and consider the Arbitration Clause set forth in the documents before signing. Thus, the facts relevant to this appeal are drawn mostly from the four corners of the documents purportedly signed by Avi, and inferences that may reasonably be drawn from Tough Mudder's failure to adduce information uniquely within its control.

Avi allegedly signed two documents, consisting of three total pages. The first document is entitled "Entry and Participation Agreements," and on its face appears to be a generic agreement that does not specifically identify the particular event entered by Avi. [App. 60].

Attached to the Entry and Participation Agreements is a two-page document entitled "*Tough Mudder LLC* ASSUMPTION OF RISK, WAIVER OF LIABILITY AND INDEMNITY AGREEMENT Mid-Atlantic Spring - 2013" (the "Agreement"), which specifically references the Event location in the second paragraph and the Mid-Atlantic Spring – 2013 event at the end of page 2. [Agreement, App. 58-59]. The two-page Agreement contains numerous sections and

---

[4] Tough Mudder and Airsquid signed their own agreement, in which they mutually agreed that "[t]he parties hereto submit to the exclusive jurisdiction of the state or federal court(s) of competent subject matter jurisdiction located in Kings County, State of New York for the purpose of resolving any dispute relating to the subject matter of the Master Agreement or the relationship between the parties pursuant to this Master Agreement. [App. 249-68 at § 14(g)].

subsections, nearly all of which are printed in tiny seven-point font. *Id.* At five different points, Avi's initials appear, including four places on page 2. *Id.* The Agreement, and the Entry and Participation Agreement, together have 2,742 words across three pages of tiny print. [Reilly Aff., App. 232-33]. In other words, Tough Mudder asked participants to review, absorb and accept the equivalent of a nine-page legal brief (assuming 300 words /page) written in 7-point font with dense legal language; and to do so while being herded through registration immediately before a 10-plus mile obstacle event, on a weekend morning in a rural location more than 60 miles from home. [Complaint, App. 1-26]. In spite of all this, Tough Mudder also inserted language at the bottom stating that "I have been given the opportunity to take this waiver to an attorney of my choosing for his or her review prior to the signing of the same and I have chosen not to do so." [App. 59].

The Agreement contains three provisions whose interaction is of particular relevance to this motion. First, near the top of page two, the Agreement sets forth the so-called "Jurisdiction and Venue Clause" requiring that any "legal action" be brought solely in a state or federal court in West Virginia:

> **Venue and Jurisdiction**: I understand that ***if legal action is brought, the appropriate state or federal trial court for the state in which the TM Event is held has the sole and exclusive jurisdiction*** and that only the substantive laws of the State in which the TM Event is held shall apply.

[App. 59] (emphasis and underlining added). This clause begins immediately next to a place where Avi was required to place his initials.

Second, the Agreement contains, buried near the middle of page two, the so-called "Arbitration Clause," which appears to require the opposite of the Venue and Jurisdiction Clause:

> **Mediation and Arbitration:** In the event of a legal issue, I agree to engage in good faith efforts to mediate any dispute that may arise. Any agreement reached will be formalized by a written contract agreement at that time. Should the issue not be resolved by mediation, ***I agree that all disputes, controversies or claims arising out of my participation in the TM event shall be submitted to binding arbitration*** in accordance with the applicable rules of the American Arbitration Association then in effect. The cost of such action shall be shared equally by the parties.

[App. 59] (emphasis added). The Arbitration Clause is the last of four consecutive subsections in seven-point font. Unlike the Venue and Jurisdiction Clause, it has no initials placed next to it.

Third, the Agreement contains on page two the so-called "Indemnity Clause," requiring Avi to pay all attorney's fees, costs and expenses incurred in any legal action involving Tough Mudder or any of the other Defendants in this case:

> **Indemnification Agreement:** In consideration of being permitted to participate in the TM event and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, ***I hereby agree to hold harmless, defend and indemnify Tough Mudder LLC (and the other Released Parties) from and against: 1) Any and all claims made by me (or any Releasing Party) arising from injury or loss due to my participation in the TM event;*** and 2) Against any and all claims of co-participants, rescuers, and others arising from my conduct in the course of my participation in the TM event. For the purposes hereof, ***"claims" includes all actions and causes of action, claims, losses, costs, expenses and damages, including legal fees and related expenses.*** This indemnity shall survive the expiration or sooner termination of the TM event.

[App. 59] (emphasis added). Avi apparently initialed the Indemnity Clause.[5] On its face (and contrary to the Arbitration Clause), the Indemnity Clause purports to require Mrs. Sengupta to pay all legal fees and related expenses (including AAA filing fees, arbitrator fees, expert fees, transcripts, constable fees, and other costs) incurred by every Defendant, not just in this case but also in the federal suit and the Maryland arbitration initiated by Tough Mudder, any arbitration to

---

[5] In addition to these three paramount clauses, there are numerous specific sections of the Agreement that will be discussed where appropriate in this brief.

be initiated against Mrs. Sengupta by Airsquid and/or Travis Pittman, and any proceedings between Defendants, who have already started pointing fingers at each other.

6. The Procedurally Flawed Presentation of the Documents

Defendants contend that Avi accessed and read a copy of "the" Agreement days, weeks or months before signing it on the morning of the Event. It would make no difference if he had, because the date on which Avi may have read the Agreement does not cure the problems with its contents. However, and contrary to the assertions made in Defendants' briefs, Defendants have adduced no evidence that Avi accessed or read the actual Agreement before signing it upon arrival at the Event.

Defendants base their contention on a formulaic and demonstrably inaccurate affidavit with exhibits, signed by a Tough Mudder executive with no firsthand personal knowledge of anything, whose statements are rife with inadmissible hearsay. [Barclay Aff., App. 347-96]. The four corners of the actual Agreement disclose that the version signed and dated by Avi on the day of the Event is specific to the Event and includes the words "Mid-Atlantic Spring - 2013" in its title. [Agreement, App. 58; Denn Aff., App. 199-201]. By contrast, documents that Defendants and their affiant attempt to pass off as copies of "the" Agreement, supposedly as accepted by Avi during electronic preregistration, are generic and do *not* include the words "Mid-Atlantic Spring - 2013" in their title. [Barclay Aff. at 347-54, 360-61, 371-72, 381-82]. Whatever these electronic documents may be, they are clearly not "the" Agreement.

Further, there are material differences between the actual Agreement and the electronic documents that Defendants attempt to pass off as copies seen in advance by Avi. The actual Agreement provides that West Virginia's courts shall have sole and exclusive jurisdiction over this case subject to West Virginia law. [Agreement, App. 59]. In stark contrast, the Venue and

Jurisdiction Clause in one of Defendants' electronic documents provides for venue and jurisdiction in Avi's home state of Maryland subject to Maryland law. [Barclay Aff., App. 361] ("if legal action is brought, the appropriate state or federal trial court for the county of Frederick in the State of Maryland has the sole and exclusive jurisdiction and that only the substantive laws of the State of Maryland shall apply").[6] Confusingly, the Venue and Jurisdiction Clauses in two other electronic documents that Defendants attempt to pass off specify no one state for jurisdiction or applicable law. [Barclay Aff., App. 372, 382] ("I understand that if legal action is brought, the appropriate state or federal trial court has the sole and exclusive jurisdiction and that only the substantive laws shall apply."). The one constant in this array of different documents and terms is that each says a "court" shall have "sole and exclusive jurisdiction" of any "legal action."

Defendants' affidavit is riddled with inadmissible and unreliable hearsay. It purportedly is based on a "review of the records of Tough Mudder maintained by it and/or by its email service provider at the time of the events in question, Constant Contact, in the ordinary course of business." [Barclay Aff., App. 347-48]. However, the web documents that Defendants attempt to pass off as Tough Mudder's regularly kept business records state on their face that they were in fact obtained from the free internet archive at WaybackMachine.org at or around the time that the affidavit was prepared, and not from Tough Mudder's regularly kept business records. [Barclay Aff., App. 365-69, 374-79]. Likewise, the email documents that Defendants attempt to pass off as having been sent to and received by Avi bear no indicia of ever having been sent to

---

[6] Compare this to Defendants' representation that "Avishek Sengupta executed a paper copy of the Assumption of Risk, Waiver of Liability, and Indemnity Agreement on April 20, 2013, the substantive terms of which were identical with those that he had reviewed and accepted on-line three months previously." Petitioners' Brief, Docket No. 15-0115, at 3.

and received by anyone, let alone Avi. [Barclay Aff., App. 384-86, 394]. The documents bear no addressees, senders, dates (other than the apparent date that they were printed-up for attachment to the affidavit "8/12/2014"), headers, or other indicia of having been sent or received. *See id.*

For all of these reasons, the trial court correctly concluded that it "is by no means established" that Avi downloaded Defendants' various electronic documents prior to signing the actual Agreement on the morning of the Event, and, in any event, "the version of the waiver that Avi was presented on the morning of the event differs in numerous ways from the version that Tough Mudder states was downloaded by Avi on a date several months prior to the event." [Order, App. 7, 15, 16].

Indeed, Defendants' affidavit and exhibits could prove only one thing: Defendants subjected Avi to a bait-and-switch of documents and terms, thereby compounding the ambiguity and procedural unconscionability that moved the trial court to declare the Agreement unenforceable. Far from bolstering Defendants' case, their affidavit further undermines it.

C. Procedural History

State Court Proceedings: Mrs. Sengupta (Avi's personal representative) filed this action in the Circuit Court of Marshall County on April 18, 2014. [Complaint, App. 443-77].[7]

That same day, Tough Mudder filed for AAA arbitration in Maryland. [App. 63-74, 77-85]. Mrs. Sengupta requested that AAA stay the arbitration pending a Circuit Court ruling on arbitrability. [App. 88-89]. When AAA refused, Mrs. Sengupta obtained a temporary restraining order and, after hearing, a preliminary injunction staying the arbitration. [App. 478-593].

---

[7] Plaintiff disputes Defendants' unsupported suggestion that her Complaint was filed after and in response to Defendants' arbitration demand.

Defendants then filed motions in the Circuit Court to compel arbitration and to dismiss, remove or transfer this action on venue-related grounds. [App. 27-158]. Plaintiff cross-moved for an order declaring the Arbitration Clause unenforceable. [App. 159-442]. The Circuit Court heard oral argument on August 22, 2014. [App. 700-835]. On September 15, 2014, the Circuit Court issued letter notices denying Defendants motions and granting Plaintiff's cross-motion. [App. 594-95]. On January 9, 2015, after receipt of proposed orders and objections thereto, the Circuit Court entered formal orders denying Defendants' motions. [App. 1-26, 637-93].

Defendants then filed notices of this appeal concerning the denial of their motions to compel arbitration, and also filed applications for writs of prohibition concerning the denial of their venue-related motions. *See* Petition Nos. 15-0098, 15-0102, 15-0114, and 15-0123.

Parallel Federal Proceedings: On June 2, 2014, Defendants Tough Mudder, Peacemaker and General Mills filed a parallel petition to compel arbitration in the Federal District Court for the Northern District of West Virginia (Martinsburg). *See Tough Mudder LLC, et al v. Sengupta,* 2014 WL 4954657 (N.D. W.Va. 2014). Mrs. Sengupta not only opposed the petition but also moved to dismiss it for failure to join an indispensable party (Travis Pittman) who would destroy diversity and thereby deprive the Federal District Court of jurisdiction. *Id.* On October 2, 2014, the Federal District Court (Groh, D.J.) granted Mrs. Sengupta's motion and dismissed the federal action without prejudice. *Id.* Defendants have appealed this dismissal to the Fourth Circuit, where the appeal is fully briefed and pending with no hearing scheduled. *See Tough Mudder, LLC, et al v. Sengupta,* Record No. 14-2200 (4th Cir. 2014).

III. SUMMARY OF ARGUMENT

The Circuit Court properly rejected Defendants' motions and refused to enforce the Arbitration Clause under ordinary principles of contract law, including ambiguity, no meeting of the minds, non-mutuality, prohibitive costs, elimination of remedies, and unconscionability. Further, application of the Arbitration Clause would violate public policy by exculpating Tough Mudder and other Defendants from judicial scrutiny and enforcement of at least three critical West Virginia safety laws. This has consistently resulted in our courts refusing to enforce offending contractual provisions, and it precludes enforcement of the Arbitration Clause in this case.

No Meeting of the Minds, Due to Irreconcilable Obligations to Resolve Legal Disputes in a West Virginia Courtroom *and* in Arbitration: First, there is no proof of an actual agreement to arbitrate. As the proponents of the Arbitration Clause, Defendants had the burden of proving a meeting of the minds that all legal disputes would be decided in arbitration. They failed to meet their burden, because the terms of the Agreement are muddled by the intrinsic inconsistency between two irreconcilable provisions: the first (the Venue and Jurisdiction Clause) requires all legal disputes to be decided in a West Virginia court which shall have ***"sole and exclusive jurisdiction,"*** while the second (the Arbitration Clause) says just the opposite and purports to send all disputes to arbitration. The terms of the Agreement are further confused by extrinsic inconsistencies, based on Defendants' affidavit claiming that Tough Mudder electronically informed Avi that all legal disputes would be decided in his home state of Maryland but then told him moments before the Event began that all disputes instead would be resolved in West Virginia. Moreover, Tough Mudder required Avi to place his initials directly next to the Venue and Jurisdiction Clause (which expressly promised that all legal disputes

would be heard in a West Virginia court); but Tough Mudder did not call attention to, or require Avi to initial, the Arbitration Clause buried as one of four fine-print clauses later in the Agreement. Consequently, there is no evidence that Avi, a non-lawyer, knowingly agreed to mandatory arbitration. Whether analyzed (a) as a lack of contract formation, or (b) ambiguity subject to the rule of *contra proferentem*, or (c) a procedurally unconscionable use of deceptive language, these irreconcilable provisions preclude enforcement of the Arbitration Clause.

Non-Mutual Obligations: Second, the clause is unenforceable because Mita Sengupta (Avi's mother and personal representative) is forced to arbitrate, but not anybody else. The West Virginia Supreme Court has held that one-way arbitration clauses may be unconscionable, and thus unenforceable, based on general contract principles. *See, e.g., Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 290-91, 737 S.E.2d 550, 559-60 (2012) (where arbitration clause is one-sided, "[a] court in its equity powers is charged with the discretion to determine, on a case-by-case basis, whether a contract provision is so harsh and overly unfair that it should not be enforced under the doctrine of unconscionability"). Here, Defendants contend that the form Agreement, which is never signed by any Defendant and never requires Defendants to acknowledge any obligations, nevertheless should be interpreted to impose a two-way burden on both Mrs. Sengupta and Defendants to arbitrate this case. [App. 147] ("Agreement entered into by the Decedent and Defendants," "all disputes, controversies, or claims arising out of my participation in the [Tough Mudder] events shall be submitted to binding arbitration"). But Defendants' contention is belied by the one-way language of the Agreement ("I agree . . ."), and by their one-way treatment of its burden. In demanding arbitration, Tough Mudder omitted two of its co-Defendants (Airsquid and Travis Pittman) (who for their part have made no effort to join), despite the fact that Tough Mudder, Airsquid and Pittman all claim status as parties to and

beneficiaries of the Agreement and each alleges that the other bears all blame in this case. Defendants' actions are undeniably at odds with the notion of a two-way agreement requiring all parties to arbitrate this case. The non-mutual nature of the Arbitration Clause renders it unconscionable and unenforceable.

Barrier to Justice Imposed by Prohibitive AAA Fees and Unconscionably One-Sided Indemnity Obligations: Third, the Arbitration Clause erects unconscionable barriers to justice. By purporting to require AAA arbitration, Defendants would force Mrs. Sengupta to pay at least $12,000 – perhaps in excess of $60,000 – for initial AAA filing fees; and that is before the imposition of recurring arbitrator compensation and other expenses. Defendants, all with vastly superior financial resources backed by millions of dollars in liability insurance protection, dismiss such fees as trivial; but our courts have found much lower financial costs to be unconscionable; and the cavalier attitude of Defendants toward these substantial expenses is a vivid illustration of the disproportionate impact that this facially neutral clause imposes upon Mrs. Sengupta and all other similarly situated participants.

Worse, the Arbitration Clause is part of a one-sided and draconian remedial scheme that literally makes it impossible for a plaintiff to recover. A separate provision in the Agreement – the Indemnity Clause – requires Mrs. Sengupta to pay 100% of Defendants' legal fees and expenses (without exception for AAA fees, arbitrator fees, lawyer fees, costs to serve process, costs of transcripts, costs of experts, and so on) ***even if the Senguptas prevail.*** The Indemnity Clause goes even further, requiring Mrs. Sengupta to indemnify Defendants for all damages that she recovers. In other words, even if Mrs. Sengupta wins, she must pay everything back to

Defendants -- even though the Agreement purports to release only "ordinary negligence" claims, and thus creates the appearance of allowing participants to recover for gross negligence. The Arbitration Clause, in concert with the Indemnity Clause, is substantively unconscionable.[8]

Finally, affirmance of the Circuit Court is proper based on our Courts' longstanding refusal to enforce contractual provisions that would exempt defendants from judicial scrutiny of conduct that violates West Virginia public safety statutes and regulations. Plaintiff's Complaint sets forth conduct that violates at least three important public safety provisions, including the Recreational Water Facilities Rule (WV C.S.R. 64-16-1, et seq.), the Amusement Rides and Amusement Attractions Safety Act (WV Code § 21-10-1, et seq.), and the Emergency Medical Services Rule (WV C.S.R. § 64-48-1, et seq.). Thus, there is no merit to Defendants' argument that its Arbitration Clause -- a key component of a scheme to exempt from judicial scrutiny and thereby perpetuate violations of important public safety provisions -- is not against public policy and *per se* unconscionable.

Cumulatively, this procedural and substantive unconscionability and public policy infirmity supports the trial court's order rejecting the Arbitration Clause and permitting Mrs. Sengupta's suit to proceed.[9]

---

[8] Cognizant of the unconscionability of the Indemnity Clause, Tough Mudder filed a brief in the Circuit Court purporting to "waive" its right to rely on it. [Motion, App. 340 n.10, 342 n.11]. Tough Mudder's cynical conduct – imposing draconian remedies in the Agreement to discourage suit from being filed, only to waive them in order to avoid the predictable refusal of our courts to enforce such one-sided agreements –illustrates the non-mutual and unconscionable interaction of the Arbitration Clause and Indemnity Clause.

[9] Mrs. Sengupta believes that the Arbitration Clause is facially unconscionable. However, she also notes that Defendants filed their motions without providing any responses to her arbitrability-related discovery requests (served in April 2014). This Court has upheld a party's right to discovery on arbitrability issues before issuance of a final order requiring arbitration. Thus, if the Court is unable to determine on the face of the Agreement that the Arbitration Clause is unenforceable, Mrs. Sengupta respectfully requests that final determination of the merits of the

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary pursuant to W.Va. Rule of App. Proc. 18(a), because the Defendants' appeals are without substantial merit; the dispositive issues have been authoritatively decided; the facts and legal arguments are adequately presented in the briefs and record on appeal; and the decisional process would not be significantly aided by oral argument. Indeed, the matter is appropriate for memorandum decision pursuant to W.Va. Rule of App. Proc. 21, because there is no substantial question of law and the trial court's decision was correct; there is no prejudicial error; and other just cause exists for summary affirmance.

If oral argument is held then, pursuant to W.Va. Rule of App. Proc. 18(c), Petition Nos. 15-0098, 15-0102, 15-0114, and 15-0123 involve the same case. Accordingly, they should be argued together or in rapid succession on such terms as the Court may prescribe.

V. LEGAL ARGUMENT: THE CIRCUIT COURT PROPERLY DENIED ENFORCEMENT OF DEFENDANTS' ARBITRATION CLAUSE UNDER ORDINARY PRINCIPLES OF WEST VIRGINIA CONTRACT LAW

The Federal Arbitration Act incorporates principles of state contract law to determine whether an arbitration clause is enforceable. Even without Plaintiff having received the discovery to which she is entitled under *Brown II,* good cause exists on the face of the Agreement for this Court to affirm, as a matter of law, that the Arbitration Clause is unenforceable under generally applicable principles of West Virginia contract law.

---

motion be deferred pending completion of arbitrability-related discovery followed by supplemental briefing on arbitrability.

A. Standard of Review and Applicable Principles of Law

1. An Order Denying Arbitration is Immediately Reviewable

An order denying a motion to compel arbitration, though interlocutory, is subject to immediate appeal with *de novo* review under the collateral order doctrine and this Court's decisions in *Credit Acceptance Corp. v. Front,* 231 W.Va. 518, 525, 745 S.E.2d 556, 563 (2013); *Schumacher Homes of Circleville, Inc. v. Spencer,* --- W.Va. ---, --- S.E.2d ---, 2015 WL 1880234, *3 (2015).

2. Arbitrability Is an Issue to Be Decided by the Court, Not the Arbitrator

As the trial court held in its June 23, 2014 Order granting a preliminary injunction [App. 582-93], the issue of arbitrability is one for the court to decide, not the arbitrator. *See, e.g., State ex rel. Dunlap v. Berger,* 211 W. Va. 549, 556, 567 S.E.2d 265, 272 (2002) ("it is for the court where the action is pending to decide in the first instance as a matter of law whether a valid and enforceable arbitration agreement exists between the parties"), *cert. denied sub nom, Friedman's, Inc. v. West Virginia ex rel. Dunlap,* 537 U.S. 1087, 123 S. Ct. 695, 154 L. Ed. 2d 631 (2002); *Schumacher Homes,* 2015 WL 1880234 at *2 ("Under the Federal Arbitration Act, the validity and enforceability of the arbitration clause is normally determined by a circuit court applying state contract law"). As set forth by the Supreme Court:

> [C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, 'the court' must resolve the disagreement. [¶] [Respondent] nonetheless interprets some of our opinions to depart from this framework and to require arbitration of certain disputes . . . based on policy grounds even where evidence of the parties' agreement to arbitrate the dispute in question is lacking. . . That is not a fair reading of the opinions . . . [¶] '[T]he federal policy favoring arbitration' . . . is merely an acknowledgement of the FAA's commitment to 'overrule the

> judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.'

Granite Rock Co. v. Teamsters, 561 U.S. at 299-302, In other words, where (as here) the enforceability of an arbitration clause is at issue, the FAA prohibits a court only from discriminating against the clause; the FAA does ***not*** require a court to treat an arbitration clause more favorably than other contracts.

3. Arbitration Clauses Are Subject to General Contract Defenses Such as Unconscionability

Although Defendants attempt to elevate arbitration clauses above all other types of contractual agreements, the Supreme Court and numerous Courts of Appeals have consistently held that arbitration clauses are no more enforceable, and no less enforceable, than any other contract or provision. *See, e.g., Granite Rock Co.,* 561 U.S. at 296-303; *Noohi v. Toll Bros., Inc.,* 708 F.3d at 611 n.6 ("presumption in favor of arbitration does not apply to questions of an arbitration provision's validity") (cases cited); *Raymond James Fin. Servs., Inc. v. Cary,* 709 F.3d 382, 386 (4th Cir. 2013) (presumption does not apply "where there remains a question as to whether an agreement even exists between the parties in the first place"); *Applied Energistics, Inc. v. NewOak Cap.Mkts., LLC,* 645 F.3d 522, 526 (2nd Cir. 2011) (same).

Under the FAA, written agreements to arbitrate disputes involving interstate commerce "'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract.'" 9 U.S.C. § 2; *Brown II,* 229 W. Va. at 389, 729 S.E.at 224. "The [FAA] does not favor or elevate arbitration agreements to a level of importance above all other contracts ... [T]he purpose of Congress in adopting it 'was to make arbitration agreements as enforceable as other contracts, but not more so.'" *Dan Ryan Builders,* 230 W. Va. at 286, 737

S.E.2d at 555, *quoting Brown v. Genesis Healthcare Corp.,* 228 W. Va. 646, 681, 724 S.E.2d 250, 285 (2011) (*"Brown I"*) reversed, in part, *sub nom, Marmet Health Care Center, Inc. v. Brown*, 563 U.S. --, 132 S. Ct. 1201, 1204, 182 L. Ed. 2d 42 (2012).

Accordingly, the United States Supreme Court has authorized state courts to "'consider whether ... arbitration clauses ... are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA,'" including generally applicable contract defenses such as fraud, duress, or unconscionability. *See Brown II,* 229 W. Va. at 390, 729 S.E.d2d at 225, *quoting Marmet Health Care Center, Inc. v. Brown*, 563 U.S. --, 132 S. Ct. 1201, 1204, 182 L. Ed. 2d 42 (2012); *Dan Ryan Builders, Inc.,* 230 W. Va. at 286, 737 S.E.2d at 555 n.6 (state courts "may void any arbitration clause on any general ground that exists at law or in equity for the revocation of any contract, including fraud in the inducement"); *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders,* 228 W. Va. 125, 133-134, 717 S.E.2d 909, 917 (2011) (same).

"Whether an arbitration agreement was validly formed, and whether the claims maintained by the plaintiff fall within the scope of the agreement, are evaluated under state law principles of contract formation." *Richmond American Homes* at 134, 717 S.E.2d at 917 (cases cited). "Nothing in the FAA 'overrides normal rules of contract interpretation.'" *Id.* (cases cited). The trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. *Id.*

"State contract law requires a trial court examining the enforceability of a contract provision to weigh the challenged provision in context, and consider other parts of the contract that relate to, support, or are otherwise intertwined with the operation of the challenged provision." *Schumacher Homes,* 2015 WL 1880234 at *8. *Accord Richmond American Homes,*

228 W. Va. at 134, 717 S.E.2d at 917 ("[i]f necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.").[10]

4. West Virginia Has Robust Contract Law Concerning Procedural and Substantive Unconscionability, Both Generally and in the Context of Arbitration Agreements

West Virginia courts are "hostile toward contracts of adhesion that are unconscionable and rely upon arbitration as an artifice to defraud a weaker party of rights clearly provided by the common law or statute." *Brown II*, 229 W. Va. at 382, *quoting Richmond American Homes,* 228 W. Va. at 129.[11] Under the doctrine of unconscionability, a court will not enforce literal terms of a contract having an overall and gross imbalance, harshness or oppressiveness in its terms. The concept of unconscionability is applied flexibly, based on all facts of a particular case. *Brown I,* 724 S.E.2d at 284. "Undertaking an analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole." *Brown II,* 729 S.E.2d at 226-27. "The particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others." *Id.*

---

[10] In acknowledgement of these principles, Defendants make numerous contextual arguments about the Arbitration Clause, which rely heavily on other clauses contained in the Agreement, including (without limitation) the Preamble, Parties, Assumption of Risk, and the Acknowledgement of Understanding clauses. *See* Appellants' Opening Brief, No. 15-0114, at 3, 4, 17; Appellants' Opening Brief, No. 15-0123, at 2, 3, 23.

[11] Defendants concede that the pre-printed, standardized, fill-in-the-blank Agreement at issue in this case "is a contract of adhesion." [Transcript, App. 748]. A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person. *See Brown I,* 228 W. Va. at 683.

"Unconscionability is an equitable principle, and the determination . . . should be made by the court." *Brown II,* 729 S.E.2d at 227. "'Under West Virginia law, [courts] analyze unconscionability in terms of two component parts: procedural unconscionability and substantive unconscionability.'" *Grayiel v. Appalachian Energy Partners 2001-D, LLP,* 230 W. Va. 91, 102, 736 S.E.2d 91 (2012), *quoting Brown I,* 724 S.E.2d at 285.; *Brown II,* 729 S.E.2d at 227. "A contract is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a sliding scale in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." *Grayiel,* 230 W. Va. at 102, *quoting Brown I,* Syllabus Point 20.[12]

Mutuality is a significant consideration in determining substantive unconscionability. *Brown II,* 729 S.E.2d at 228. Moreover, "when an agreement to arbitrate imposes high costs that might deter a litigant from pursuing a claim, a trial court may consider those costs in assessing whether the agreement is substantively unconscionable." *Id.,* 729 S.E.2d at 229. "No single, precise definition of substantive unconscionability can be articulated because the factors to be

---

[12] In *Credit Acceptance Corp.,* 231 W.Va. at 526 n.8, Justice Davis "question[ed] the need for establishing both substantive and procedural unconscionability to find a contract term is unenforceable." Justice Davis's view that either procedural or substantive unconscionability alone may suffice comports with this Court's holding in *Murphy v. North American River Runners, Inc.,* 186 W.Va. 310, 412 S.E.2d 504 (1991), wherein an anticipatory release was held unenforceable for a policy/substantive reason alone: It would have limited the defendant's liability under the West Virginia Whitewater Responsibility Act of 1987, though "a safety obligation created by [] statute [] is an obligation owed to the public at large and is not within the power of any private individual to waive." *Id.* at 315. Because the Arbitration Clause at issue is no more enforceable than the release in *Murphy* or any other contract term, it should be declared unenforceable on grounds of procedural ***and/or*** substantive unconscionability.

considered vary with the content of the agreement at issue. Accordingly, courts should assess whether a contract provision is substantively unconscionable on a case-by-case basis." *Id.*

B. The Arbitration Clause in Tough Mudder's Contract Is Procedurally and Substantively Unconscionable

The Arbitration Clause is unconscionable and thus unenforceable. As set forth below, it is unnecessary for the Court to find that any one of these problems standing alone would require a finding of unconscionability (although that well might be the case), since cumulatively these factors paint a compelling picture of procedural and substantive unfairness.

1. The Arbitration Clause Is a "Bad" Adhesion Contract Containing Harsh Provisions of the Type that the West Virginia Supreme Court Has Ruled Unconscionable

"A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it." Syl. Pt. 18, *Brown I*, 228 W. Va. 646, 724 S.E.2d 250, overruled in part on other grounds by *Marmet Health Care Center, supra.* Here, it is undisputed that the Arbitration Clause is a contract of adhesion. [Transcript, App. 748]. It was submitted by a party with superior bargaining power (TM) on a "take it or leave it basis." While contracts of adhesion are not *per se* unconscionable, this Court has regularly held that they "require greater scrutiny." *See, e.g., Dunlap,* 211 W. Va. at 557, 567 S.E.2d at 273; *Grayiel,* 230 W. Va. at 103, 736 S.E.2d at 103. In determining whether the arbitration clause is procedurally unconscionable, a "[f]inding that there is an adhesion contract is the beginning of the analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not." *Id.*

An example of a "good adhesion contract" that was found to be enforceable by this Court is discussed in *State ex rel. AT&T Mobility v. Wilson*, 226 W. Va. 572, 703 S.E.2d 543 (2010) ("*AT&T I*") and *Shorts v. AT&T Mobility*, 2013 WL 2995944 (W. Va. No. 11-1649, June 17, 2013) (memorandum opinion) ("*AT&T II*"). In *AT&T I* and *AT&T II*, the plaintiffs filed a putative class action alleging violations of the Consumer Credit and Protection Act. The Court upheld the Circuit Court's allowance of AT&T's motion to compel arbitration. *See AT&T II*, 2013 WL 2995944, at *6. In doing so, the Court noted that AT&T's arbitration agreement was "consumer friendly" and found it conscionable because:

1. AT&T paid the costs of arbitration;

2. There were no restrictions on remedies available to the claimant;

3. A customer's billing address determined the venue of arbitration;

4. A customer may opt to have an in-person hearing, a telephonic hearing, or a "desk arbitration";

5. AT&T was precluded from seeking attorney's fees; and

6. AT&T was required to pay the customers either the arbitration award or $10,000 plus double attorney's fees if the award was more than AT&T's last settlement offer.

AT&T II, 2013 WL 2995944, at *2, n. 3. As discussed in greater detail below, Tough Mudder's Arbitration Clause imposes drastically harsher terms than those found conscionable in *AT&T I* and *AT&T II*. Few or none of the "consumer friendly" terms in AT&T's arbitration agreement exist here. As such, this Arbitration Clause shares many of the unconscionable features found in other "bad adhesion contracts" that the Court has declined to enforce.

2. Tough Mudder Inserted Irreconcilable Clauses Requiring Legal Disputes to Go to Court and Also to Arbitration; These Provisions Are Procedurally Unconscionable and Establish the Lack of Real Assent to Arbitration

The terms of the Agreement are muddled by both intrinsic and extrinsic inconsistencies. The Agreement itself contains two provisions irreconcilably in conflict. The Venue and Jurisdiction Clause plainly requires "that if legal action is brought, the appropriate state or federal trial court for the state in which the TM Event is held has the ***sole and exclusive jurisdiction*** . . ." [App. 59] (emphasis and underling added). Avi's initials appear directly adjacent to this clause. *See id.* It is difficult to imagine a clearer case of a participant being told that any legal disputes arising from the Tough Mudder event would be decided in a West Virginia courtroom, ***not*** before a $400/hour arbitrator in a private conference room.

But half-way down the same page, buried as the last of four so-called "Other Agreements," the document states in fine print that "all disputes, controversies or claims arising out of my participation in the TM event shall be submitted to binding arbitration ...." *Id.* (Arbitration Clause). No initials are placed next to this clause. But its words irreconcilably contradict the flat, unqualified statement in the Venue and Jurisdiction Clause that "if legal action is brought, the appropriate state or federal trial court for the state in which the TM Event is held has the ***sole and exclusive jurisdiction***." *Id.* (emphasis and underling added).[13] By prominently highlighting (and requiring initialized acknowledgement of) a plainly worded clause committing all legal actions to a West Virginia courtroom, but then burying (and requiring no

[13] Neither the wording nor the positioning of the two clauses supports Defendants' argument that the Arbitration Clause is primary and somehow supplemented by the Jurisdiction and Venue Clause. If this were the case, and the author of the agreement intended to convey it to his audience, then one would expect the Arbitration Clause to immediately precede the Venue and Jurisdiction Clause and at least one of the two clauses to explain their interaction.

acknowledgement of) a contrary provision purporting to send all legal disputes to arbitration, Tough Mudder's contract confused participants and distracted attention away from the Arbitration Clause. Such undue complexity of wording and structure is the soul of procedural unconscionability, and makes it impossible to conclude that Avi Sengupta had a "meeting of the minds" with respect to arbitrability.

The terms of the Agreement are further muddled by extrinsic inconsistencies. Trying to prove that Avi had plenty of time to consider the Arbitration Clause before signing the Agreement at the Event, Defendants submitted a hearsay affidavit asserting that they provided Avi with electronic copies of the documents several days or weeks before the event. However, unlike the actual Agreement that requires Avi and his family to travel to West Virginia for a court action subject to West Virginia law [App. 59], the Venue and Jurisdiction Clause in one of the electronic documents allegedly provided to Avi promises that legal actions will be pursued in Avi's home state of Maryland and subject to Maryland law. [Barclay Aff., App. 361 ("if legal action is brought, the appropriate state or federal trial court for the county of Frederick in the State of Maryland has the sole and exclusive jurisdiction and that only the substantive laws of the State of Maryland shall apply")].[14] More confusing still, the Venue and Jurisdiction Clauses in two other electronic documents allegedly made available to Avi fail to specify any state for jurisdiction or applicable law. [Barclay Aff., App. 372, 382] ("I understand that if legal action is

---

[14] The paper copy putatively signed by Avi includes an "Integration Clause" providing that all prior written agreements are thereby nullified and superseded. This is significant since the pre-registration version (which Tough Mudder insists that it provided to Avi) identifies Avi's home state of Maryland (not West Virginia) as the forum for legal actions to be brought. By baiting-and-switching in this manner, and also including an Integration Clause, Tough Mudder imposed an unrealistically difficult task on laypersons like Avi, who could have spotted these changes only by performing a granular re-review of tiny (7-point font) print in search of important but buried changes, all while standing in line waiting to begin the Event, necessarily without having any opportunity to consult with counsel.

brought, the appropriate state or federal trial court has the sole and exclusive jurisdiction and that only the substantive laws shall apply."). While one of the electronic documents provides some assurance to Avi that his home state will consider all legal disputes, the constant in all of these documents is that each assures him that some "court" has "sole and exclusive jurisdiction."

These conflicting documents compel two conclusions. First, there is no basis upon which to conclude that Avi Sengupta, when signing the actual Agreement, had formed an intent to agree to arbitrate all disputes. To the contrary, his focus was drawn only to the Venue and Jurisdiction Clause, next to which he placed his initials. His initials did not subsequently appear on the Agreement until the section below the Arbitration Clause. Defendants cannot meet their burden of showing that Avi had any awareness that the Venue and Jurisdiction Clause did not mean exactly what it said, or that anything else in fine print in the Agreement might contradict it.

Second, these conflicts exemplify procedural unconscionability, especially if it is assumed *arguendo* that Defendants' affidavit is true. As noted above, Tough Mudder has produced no evidence that Avi ever saw the actual Agreement before signing it just prior to the Event.[15] Just before starting the event, Avi was presented three pages of documents to sign,

---

[15] Again, there is no evidence that Avi downloaded the actual Agreement prior to the Event. The four corners of the Agreement disclose that – unlike generic agreements allegedly available on the Tough Mudder website – the version signed by Avi is specific to the Event and includes the words "Mid-Atlantic Spring - 2013" in its title. [Agreement, App. 58; Denn Aff., App. 199-201]. Further, the actual Agreement is signed and dated on the day of the Event. [Agreement, App. 59]. On this record, it is clear that Avi first reviewed the actual Agreement just before starting the Event. Even if, as Defendants allege, Avi was presented with the opportunity to view other documents resembling the Agreement prior to the Event (and we assume *arguendo* that Avi received and read them), then the documents were materially and misleadingly different from the actual Agreement. By way of relevant example, the Venue and Jurisdiction Clause in one document provided for venue and jurisdiction in Avi's home state of Maryland as opposed to West Virginia. [Barclay Aff., App. 361] ("if legal action is brought, the appropriate state or federal trial court for the county of Frederick in the State of Maryland has the sole and exclusive jurisdiction and that only the substantive laws of the State of Maryland shall apply"). The Venue and Jurisdiction Clause in two other documents specify no state for jurisdiction or applicable law.

containing dense legal language in tiny, 7-point font. [Agreement, App. 58-60]. Cumulatively, the documents exceeded 2,700 words – the equivalent of a nine-page legal brief. [Reilly Aff., App. 232-33]. Avi had no reasonable opportunity to consult a lawyer, as the Agreement was provided on a weekend, in a remote location, shortly before the start of the Event.[16] [Complaint, App. 1-26]. In short, even if a skilled attorney could have been tracked down on a weekend and then somehow could have reconciled the seemingly irreconcilable Venue and Jurisdiction Clause and the Arbitration Clause, it is impossible to conceive how a layman in Avi's situation could have intelligently done so. *See Brown I,* 228 W. Va. at 681, 724 S.E.2d at 285 ("the particular setting existing during the contract formation process" and "whether the terms were explained to the 'weaker party'" are factors relevant to determination of meeting of the minds and procedural unconscionability), *vacated sub nom on other grounds, Marmet Health Care Center, supra*[17]

[Barclay Aff., App. 372, 382]. Defendants' failed attempts to show that Avi reviewed the actual agreement before arriving at the Event show, at most, that Defendants subjected Avi to an unconscionable bait-and-switch or shell game of documents and terms.

16 While Defendants now claim that of course they would have allowed Avi to start the event later in order to allow him to take all the time he needed to read and understand the documents and to track down a lawyer to conduct a telephonic review of the documents on a weekend morning, there is zero record evidence that such assurances were communicated to Avi or any other participant. Moreover, even if such assurance had been provided to Avi, the patently unreasonable premise behind this assurance – that it was feasible for a layman like Avi to conduct a reasonable review and identify the issues raised by the fine print of the tucked-away Arbitration Clause under such circumstances –strains credibility.

17 *Brown I* remains good law in nearly all respects, save one not relevant to this motion. In *Marmet Health Care Center, supra,* the United States Supreme Court overturned *Brown I,* due to the state Supreme Court's improper reliance on a blanket prohibition against pre-dispute agreements to arbitrate personal injury claims against nursing homes, in violation of an FAA requirement that arbitration agreements be placed on equal footing with other types of contracts. On remand, the West Virginia Supreme Court affirmed *Brown I* in all respects save for its reliance on the blanket prohibition, and then remanded the case to the trial court for findings consistent with its opinion. *See Brown II,* 229 W. Va. 382.

Having presented the Agreement to Avi in circumstances not conducive to a reasonable review, Tough Mudder exacerbated the situation through its formatting decisions when drafting the Agreement. Tough Mudder utilized the title of the Agreement and bold print and headings to direct attention to certain terms that it evidently decided were important, and then required participants to place initials next to select provisions. For example, the otherwise descriptive title of the Agreement mentions Assumption of Risk, Waiver of Liability, and Indemnity. [Agreement, App. 58]. However, it makes no mention of "arbitration." Similarly, the headings preceding the clauses entitled "Assumption of Inherent Risks" and "Waiver of Liability for Ordinary Negligence" are printed in larger, more prominent font and are underlined; and initials are required next to the clauses. [Agreement, App. 58-59]. However, such attention, detail and emphasis were avoided with respect to the Arbitration Clause. That clause does not have its own larger-font/underscored heading; and it is buried in fine print in the middle of page 2 of the Agreement, under a non-descriptive heading entitled "Other Agreements," where it is tucked beneath legalistic clauses called "Severability" and "Integration." While initials are required next to numerous other provisions, no initials are required to be placed next to the Arbitration Clause.

In short, Defendants called attention to some clauses (including a clause promising that all legal actions would be heard in a West Virginia court), while simultaneously diverting Avi's focus away from the Arbitration Clause. *See Brown I,* 228 W. Va. at 681, 724 S.E.2d at 285 ("fine print," "unduly complex contract terms," "the particular setting existing during the contract formation process," and "whether the terms were explained to the 'weaker party'" are relevant to meeting of the minds and procedural unconscionability); *id.* ("more likely to find

unconscionability in consumer transactions . . . than in contracts arising in purely commercial settings involving experienced parties").

This pattern – a layman presented with ambiguous wording in a manner that precludes a fair opportunity to consider and understand the terms of the contract – is the essence of procedural unconscionability. "Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction.... These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract is formed, including whether each party had a reasonable opportunity to understand the terms of the contract." *Brown II,* 729 S.E.2d at 227.[18]

West Virginia is hardly alone in rejecting arbitration clauses found in an agreement with ambiguous and irreconcilable provisions. For example, the Montana Supreme Court refused enforcement of a mandatory arbitration clause where the document, on the one hand, promised that "nothing in this agreement shall construe any limit of Resident's or Owner's inalienable legal rights," while on the other hand stating that the parties "are giving up and waiving their right to have claims decided in a court of law before a judge and a jury." *Riehl* v. *Cambridge Court GF, LLC,* 355 Mont. 161, 170, 226 P.3d 581, 587 (2010). Finding that the "Agreement

---

[18] Procedural unconscionability often begins with a contract of adhesion . . . [but] finding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not." *Brown II,* 729 S.E.2d at 228.

itself never explains how these two provisions are to be reconciled," the court concluded "that the Agreement, when considered as a whole, is ambiguous as to whether Riehl actually agreed to waive her rights to access to the courts and a trial by jury when she entered into the Agreement." *Id.* (refusing to enforce arbitration clause).

Similarly, in *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 62-63, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), the United States Supreme Court applied *contra proferentem* to construe an arbitration clause against the drafter, reasoning that the drafter of an ambiguous arbitration agreement cannot claim the benefit of the doubt created by the ambiguity. *Id.* West Virginia is equally emphatic. The doctrine of *contra proferentem* requires that, "[i]n case of doubt, the construction of a written instrument is to be taken most strongly against the party preparing it." *See, e.g., Henson v. Lamb,* 120 W. Va. 552, 199 S.E. 459, 461-62 (1938). In *Richmond American Homes,* 228 W. Va. at 140, 717 S.E.2d at 925, the Court applied this rule to invalidate an arbitration clause where inconsistencies in the agreement intimated a right to bring a "court action." Where (as here) an agreement uses ambiguous language suggesting both a right to file a court action and a mandate to arbitrate, the Supreme Court has found such a contradiction "muddles the language" and "creates an ambiguity in the arbitration provision that, pursuant to well-settled West Virginia contract law, must be construed against the drafting party...." *Id.,* 228 W. Va. at 140, 717 S.E. 2d at 924.

If, as Defendants allege in their affidavit, they had previously provided Avi with other documents containing different venue and jurisdiction provisions, then Defendants also subjected Avi to a bait-and-switch of documents and terms, thereby compounding the ambiguity and procedural unconscionability that moved the trial court to declare the Agreement unenforceable.

In other words, Defendants' affidavit amplifies the procedural unconscionability in the formation of the agreement.[19]

Accordingly, the Court should affirm the trial court's holding either that no meeting of the minds was formed or that the Arbitration Clause is otherwise unenforceable.[20]

3. The Lack of An Opt-Out Provision Weighs In Favor of Finding that the Arbitration Clause is Procedurally Unconscionable

In *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341, 752 S.E.2d 372, 378 (2013), a loan servicer filed a petition for writ of prohibition to prevent the Circuit Court of Kanawha County from enforcing an order that denied the loan servicer's motion to compel arbitration in the underlying action, in which mortgagors alleged violations of the Consumer Credit and Protection Act. This Court granted the loan servicer's writ and found the arbitration agreement enforceable. *Id.* In regard to the determination of procedural unconscionability, the Court held the arbitration agreement was valid because it "contained a plainly worded statement, placed conspicuously above the signature line in all caps, that advised the [plaintiffs] that they could ***reject*** the arbitration agreement and the lender would not refuse to complete their loan due

---

[19] Defendants' surreptitious substitution of documents and terms is not only evidence of procedural unconscionability, but also a separate and independent ground for declaring the Arbitration Clause unenforceable. *See, e.g., Connors v. Fawn Mining Corp.*, 30 F.3d 483, 493 (3rd Cir. 1994) (Where one "surreptitiously substitutes a materially different contract document . . . we think it clear that there has been a fraud in the execution of the contract and that the agreement reflected in the executed document is *void ab initio* and unenforceable.").

[20] Under West Virginia law, it also is relevant that the Arbitration Clause was inserted into a consumer contract, not a commercial agreement, and therefore the consumer would not have been expected to have the experience or expertise to anticipate the presence of an Arbitration Clause, let alone the wherewithal to try to parse the differences between the Venue and Jurisdiction clause (requiring disputes to go to a West Virginia court) and the Arbitration Clause (purporting to send disputes to arbitration). *See Brown I,* 228 W. Va. at 681, 724 S.E.2d at 285 ("courts are more likely to find unconscionability in consumer transactions . . . than in contracts arising in purely commercial settings involving experienced parties").

to such refusal." *Id.*, 232 W. Va. 341, 752 S.E.2d at 389. Here, the Arbitration Clause contains no similar opt out provision, which weighs in favor of finding it procedurally unconscionable.

4. The Arbitration Clause Is Non-Mutual and Therefore Substantively Unconscionable

"Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party." *Brown II,* 229 W. Va. at 393. "The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement." *Id.* "Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns." *Id.*

A lack of mutuality – that is, "'an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party'" – is a prototypical example of substantive unconscionability rendering an arbitration clause unenforceable. *See id.* (cases cited). "Some courts suggest that mutuality of obligation is the locus around which substantive unconscionability analysis revolves." *Id.* (cases cited). "Agreements to arbitrate must contain at least 'a modicum of bilaterality' to avoid unconscionability." *Id.* (cases cited).

Defendants selectively cite two or three phrases in the agreement (such as "all disputes" and "'arising out of participation' in the Tough Mudder event"), taking these words out of context to argue that the arbitration agreement is somehow mutual. These isolated phrases do nothing of the sort. When the Agreement is read as a complete document, the lack of mutuality becomes obvious, as it imposes the burden of legal restrictions and waivers only upon participants, while preserving the benefits of such restrictions and waivers solely for Defendants. For example, the Arbitration Clause imposes on Mrs. Sengupta, and only on her, a unilateral

obligation to arbitrate, by its language stating that "***I agree*** to engage in good faith efforts to mediate any dispute that might arise. . . Should the issue not be resolved by mediation, ***I agree*** that all disputes, controversies, or claims arising out of my participation in the TM event shall be submitted to binding arbitration . . ." [Agreement, App. 59]. While Avi was required to affirm his obligation to arbitrate, nothing in the Arbitration Clause, or anywhere else in the Agreement, required Tough Mudder, the other Defendants, or "the parties" to do anything. On its face, the Arbitration Clause imposes restrictions solely on the participants, not the organizers or the parties as a whole, and is therefore non-mutual.

The unilateral and non-mutual nature of the Arbitration Clause is consistent with the entire body of the Agreement. The preamble to the Agreement states (inaccurately) that "THIS DOCUMENT . . . WILL AFFECT ***YOUR*** LEGAL RIGHTS AND WILL ELIMINATE ***YOUR*** ABILITY TO BRING FUTURE LEGAL ACTIONS." [Agreement, App. 58]. No statement is made that the document will eliminate Tough Mudder's or other Defendants' ability to bring future legal actions. Indeed, the word "I" appears fifty-seven times in clauses throughout the Agreement. For example, the Agreement purports to impose upon Avi (but not upon Tough Mudder or other Defendants) unilateral obligations of indemnity, payment of attorney's fees, assumption of risks, waiver of certain types of claims, and numerous other legal strictures that Tough Mudder cannot plausibly argue to be worded bilaterally or mutually. [Agreement, App. 58-59]. Any fair reading of the Agreement allows for only one conclusion: From start to finish, it imposes only unilateral obligations on the participant, while imposing no restrictions on Tough Mudder or other Defendants. Thus, it is implausible for Defendants to argue that the Arbitration Clause, alone among the many sections of this unilateral contract, should be read to create mutual obligations.

This case closely matches the Fourth Circuit's decision in *Noohi v. Toll Bros., Inc.*, 708 F.3d at 609-10, in which the arbitration clause in a purchase and sale agreement provided that "Buyer . . . hereby agree[s] that any and all disputes with Seller . . . shall be resolved by binding arbitration" and that "BUYER HEREBY WAIVES THE RIGHT TO A PROCEEDING IN COURT . . ." Despite the blatant non-mutuality, the Seller attempted to argue that the arbitration clause should be *implicitly* read to apply mutually to all claims between the parties. Both the District Court and the Fourth Circuit rejected the concept of implicit mutuality, with the Fourth Circuit taking special note that "all subject and verb pairings relate to the buyer's obligations (*i.e.,* buyer agrees, buyer waives, etc.); nowhere does the provision state that 'Buyer and Seller agree,' or the passive 'it is agreed.'" *Id.* The situation is identical with regard to Tough Mudder's non-mutual Agreement. From start to finish, the Agreement imposes obligations solely on Avi. While Avi, on 57 occasions, was forced to state that "I agree" to one thing or another, neither the Arbitration Clause nor any other provision of the Agreement purports to extract any explicit promise from, or to impose any express obligation on, Defendants.

Defendants attempt to distinguish *Noohi* by stating that the arbitration clause in that case was held to be non-mutual because it provided only that "Buyer ... hereby agree[s] that any and all disputes with the Seller ... shall be resolved by binding arbitration." (emphasis in Tough Mudder's Opening Brief, No. 15-0114, at 23). According to Tough Mudder, that clause somehow meant that disputes that Buyer had with Seller would be arbitrable but that disputes that Seller had with Buyer somehow would not be arbitrable. *See id.* With due respect, Tough Mudder does not fairly construe the Fourth Circuit's reasoning in *Noohi.* The central concern expressed by the Fourth Circuit was that "all the subject and verb pairings relate to the buyer's obligations (*i.e.*, buyer agrees, buyer waives, etc.); nowhere does the provision state that "Buyer

and Seller agree," or the passive "it is agreed." *Noohi*, 708 F.3d at 610. The Fourth Circuit's principal basis for finding non-mutuality applies with equal force in this case. As noted, the Agreement contains at least 57 instances of Avi agreeing to terms ("I agree"), but not a single instance of both parties jointly agreeing (*i.e.*, "the parties agree") and not a single instance of obligations being stated passively (*i.e.*, "it is agreed"). The Fourth Circuit's secondary basis for finding non-mutuality applies in this case too. The agreement in *Noohi* contemplated that the Seller might bring counterclaims against Buyer, just as the Agreement in this case contemplates that Tough Mudder might bring claims against Avi for misconduct. The Fourth Circuit noted non-mutuality in that "only the buyer, but not seller, waives the right to a court proceeding" for its counterclaims, just as only Avi and not Tough Mudder waives its right to a court proceeding under the one-way arbitration clause at issue in this case. *Id.* at 610-11. It is difficult to conceive of a case more closely on point with respect to non-mutuality than the Fourth Circuit's decision in *Noohi*.

In short, this Agreement – including the Arbitration Clause – can only be called non-mutual. Under *Brown II,* such non-mutual arbitration provisions are substantively unconscionable and thus unenforceable.

5. The Arbitration Clause Imposes Unconscionably Prohibitive Costs

This Court "recently noted in *State ex rel. Richmond American Homes v. Sanders* that when 'an agreement to arbitrate imposes high costs that might deter a litigant from pursuing a claim, a trial court may consider those costs in assessing whether the agreement is substantively unconscionable.'" *Brown II,* 229 W. Va. at 394. "As even the United States Supreme Court has recognized, '[t]he existence of large arbitration costs could preclude a litigant ... from effectively vindicating her ... rights in the arbitral forum.'" *Id.* (cases cited). "'[I]t is not only the costs

imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process.'" *Id.* (cases cited). "In *State ex rel. Dunlap v. Berger,* [our Supreme Court] held that a trial court could consider the effect of those high costs in its substantive unconscionability analysis." *Id.*

> Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon or would have a substantial deterrent effect upon a person seeking to enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

Id., (quoting Syl. Pt. 4, *Dunlap,* 211 W.Va. at 551, 567 S.E.2d at 267).

In this case, the Arbitration Clause provides that "[t]he cost of such action shall be shared equally by the parties." [Agreement, App. 59]. Even if it were so (and the Indemnification Clause creates substantial doubt as to that result), in order for Mrs. Sengupta to prosecute her claims for the wrongful death of her son, she would be required to pay huge upfront fees to the American Arbitration Association ("AAA") simply to be heard. First, AAA charges filing fees on a sliding scale that increases with the size of the plaintiff's damages and demand. Where (as here) the damages and demand exceed $10,000,000, AAA charges a "base fee" somewhere between $12,800 and $65,000. [Denn Aff., App. 199-200; AAA Standard Fee Schedule, App. 210].[21] AAA also charges a "final fee" of $6,000. *See id.* These fees become non-refundable once an arbitrator is appointed or, even if no arbitrator is appointed, 60 days after payment.

---

[21] Where (as here) the "amount of claim" exceeds $10,000,000, AAA charges a minimum "Base fee of $12,800 plus .01% of the amount above $10,000,000. Fee Capped at $65,000." [AAA Standard Fee Schedule, App. 210].

[AAA Standard Fee Schedule, App. 211]. In addition, Mrs. Sengupta will be responsible for the arbitrator's fees (which typically range from $300 to $500 per hour and could be substantially higher in a large metropolitan area such as Baltimore, Maryland), as well as AAA's administrative fees for other services. [Denn Aff., App. 199-200; AAA Standard Fee Schedule, App. 208-09]. Many of these additional fees must be deposited in advance. *Id.* Given the number of parties and witnesses, as well as the complexity of the factual issues and claims, an arbitrator may well spend hundreds of hours on this case, at a cost of tens of thousands of dollars or more to Mrs. Sengupta, ***simply to get a ruling on the merits.*** In *Dunlap*, *supra,* this Court cites numerous cases in which arbitration clauses were deemed unconscionable and therefore unenforceable based on costs far smaller than those at issue here. *See Dunlap,* 211 W. Va. at 565-566.

That is only the beginning of Mrs. Sengupta's financial exposure. What Defendants purport to give in the Arbitration Clause (*i.e.,* costs "shall be shared equally"), they take away with a one-sided Indemnity Clause, which imposes a non-mutual obligation on Mrs. Sengupta "to hold harmless, defend and indemnify Tough Mudder LLC (and the other Released Parties) from and against: 1) any and all claims made by me (or any Releasing Party) arising from injury or loss due to my participation in the TM event; and 2) Against any and all claims of co-participants, rescuers, and others arising from my conduct in the course of my participation in the TM event." [Agreement, App. 59]. The Indemnity Clause specifically "include[s] legal fees and related expenses." *Id.* Thus, if Mrs. Sengupta is compelled to arbitrate, she will be exposed to a claim for Defendants' attorney's fees, costs and damages in the arbitration, more than doubling her exposure. *Cf. Brown II,* 229 W. Va. at 394 ("'[I]t is not only the costs imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise

of the constitutional right of due process.'"). Finally, she would need to reimburse Tough Mudder and the other Defendants for all damages she recovers. The combination of the Arbitration Clause and the Indemnity Clause effectively provide that Mrs. Sengupta can recover nothing at arbitration.

In sum, by imposing non-mutual and potentially ruinous costs upon participants like Avi Sengupta and his estate, the Arbitration Clause (when read in light of the entire Agreement) creates a substantial deterrent effect upon not only Mrs. Sengupta but all other persons seeking fair compensation for injuries. It is a model of substantive unconscionability, and it should not be enforced.

6. The Unconscionability of the Arbitration Clause Is Not Vitiated By the Fact That It Relates to Participation in a Voluntary Recreational Activity

Defendants argue that the Arbitration Clause should be accorded substantial deference because it arises in the context of a "voluntary recreational activity" and therefore should not be deemed *per se* unconscionable. However, the authority that they rely on is inapplicable to a case of this nature, in which Tough Mudder created artificial and gratuitously dangerous obstacles (as opposed to natural hazards such as rivers or mountains), and then intensified the danger through grossly negligent design, construction and operation of the obstacles in violation of at least three West Virginia public safety laws governing the licensing, inspection and general operation of the obstacles.

In *Brown I,* this Court analogized the enforceability of an arbitration clause to that of a pre-injury release, noting that enforceability is determined under "normal rules of contract interpretation." *Id.* The discussion then turned to consideration of precedent, including the *Murphy* case, where an anticipatory release was held to be against public policy (and, thus,

unenforceable) because it would have limited the defendant's liability under the West Virginia Whitewater Responsibility Act of 1987, though:

> [A] safety obligation created by [] statute [] is an obligation owed to the public at large and is not within the power of any private individual to waive.

Murphy, 186 W.Va. at 315. In *Brown* II, the Court reinforced this point in broader terms, stating that the courts of this state are "hostile toward contracts of adhesion that are unconscionable and rely upon arbitration as an artifice to defraud a weaker party of rights clearly provided by the common law or statute." *Brown II,* 229 W. Va. at 382, *quoting Richmond American Homes,* 228 W. Va. at 129. The Arbitration Clause created by Tough Mudder suffers from the same fatal flaw as the release struck down in *Murphy.* Mrs. Sengupta has alleged in her Complaint and briefs that Defendants violated numerous public safety statutes and regulations in causing Avi's death, including the following:

- Recreational Water Facilities Rule (WV C.S.R. 64-16-1, et seq.): As a "body of water" that was "constructed or installed for the purpose of public swimming," Defendants' Obstacle fell squarely within the definition of a "recreational water facility." Accordingly, Defendants were required to obtain construction and operating permits and inspections. They were also required to maintain water clarity, an emergency action plan, and overall safety. Because Defendants charged admission, they were also required to provide certified lifeguards on duty at all times. Defendants failed to do any of these things.

- Amusement Rides and Amusement Attractions Safety Act (WV Code § 21-10-1, et seq.): As a "structure around, over or through which people may move or walk without the aid of any moving device integral to the building or structure that provides amusement, pleasure, thrills or excitement, including those of a temporary or portable nature," Defendants' Obstacle fell squarely within the definition of an "Amusement Attraction." Accordingly, Defendants were required to obtain a permit and inspection. They were also required to maintain safety. They were also required to have a "Qualified Person" with documented training and experience in charge and at the controls of the Obstacle. Defendants failed to do any of these things.

- Emergency Medical Services Rule (WV C.S.R. § 64-48-1, et seq.): As an entity engaged in the provision of emergency medical services operating in this state, Defendant Airsquid Ventures (which operated in the name of its unincorporated Amphibious Medics division) was required to be certified and licensed as a "emergency medical services agency" in this state, and the contractors and employees through which Airsquid Ventures functioned were required to be certified and licensed as "emergency medical services providers" in this state. Defendant failed to do any of these things.

[Complaint, ¶¶ 66, 103(c), (f), (g), App. 459, 465-66].[22]

The safety obligations embodied by these statutes and regulations, including the implicit obligations to answer for them and suffer enforcement in a court of law, are obligations "owed to the public at large." *Murphy,* 186 W.Va. at 315. Thus, they are "not within the power of any private individual to waive." *Id.* Yet, the Arbitration Clause is a key component of a contractual scheme to shield (and thereby perpetuate) violations from judicial oversight and corrective action, via findings of fact, rulings of law, awards of damages, and prohibitions in the form of temporary and permanent injunctions. The mere fact that the incident took place during a voluntary recreational activity does not change this analysis. While Defendants emphasize this Court's statement in *Brown I* that "agreements absolving participants and proprietors from liability during hazardous recreational activities with no general public utility . . . will tend to be

---

[22] Plaintiff briefed these same facts concerning Defendants' violations of public safety laws to the Circuit Court in response to Defendants' motions to dismiss or transfer based on venue. The Circuit Court's denial of Defendants' venue motions prompted Defendants to file a writ of prohibition, captioned *Airsquid Ventures, Inc. v. Sengupta,* No. 15-0098 (W. Va. S.Ct.). In the writ action, the pertinent pages of Plaintiff's brief are included in Airsquid's Appendix at 173-74. In this appeal, the Circuit Court docket sheet contained in the parties' joint appendix reflects the filing of Plaintiff's brief in the trial court. [Docket Sheet, App. 837, Lines 90-94].

enforceable," *Brown I* at 687, the Court in the very same sentence emphasizes that such enforcement is subject to exceptions for "willful misconduct or statutory limitations." *Id.* [23]

As noted above, Plaintiff's complaint alleges grossly negligent conduct regarding a totally man-made obstacle on a course designed, constructed, and monitored by Defendants—not a naturally occurring hazard such as ice on a ski slope or high winds during a sky diving attempt.[24] Plaintiff alleges, with specificity, a total disregard for multiple statutes and regulations promulgated by the State of West Virginia to ensure the public's health and safety. This Court found in *Murphy*, following the *Restatement (Second) of Contracts § 195(2)(b)-(c)*, that contractual provisions tending to shield tortfeasors from accountability for such violations are void as against public policy. *See Murphy* at 509; *see also Johnson v. New River Scenic Whitewater Tours, Inc.*, 313 F. Supp. 2d 621, 631-32 (S.D.W. Va. 2004) (relying upon *Murphy* and finding a limitation of liability provision unconscionable when case includes alleged violations of West Virginia statute concerning whitewater rafting operations). Indeed, the critical role of our courts in enforcing the health and safety statutes of West Virginia is embodied in the concept of "private attorneys general," whereby "[o]ur statutes and common law provide in some cases for the award of attorney fees to encourage the 'private attorney general' enforcement of laws that protect the general welfare." *Dunlap*, 211 W. Va. at 567 n.15. Just as overly broad releases are unenforceable where they would effectively gut the enforcement of

---

[23] As the release at issue here purports to release only claims for "ordinary negligence," Plaintiffs need only show gross negligence on the part of Defendants, and do not need to prove willful conduct. [App. 58].

[24] Importantly, cases permitting contractual limitations on liability arising out of hazardous recreational activities tend to focus on hazards posed by natural conditions, as opposed to man-made hazards. *See Hardin v. Ski Venture, Inc.*, 848 F. Supp. 58, 61 (N.D.W. Va. 1994) (denying summary judgment to ski resort operator when allegations were that injury resulted from negligent placement of snowmaking machine as opposed to any naturally occurring condition).

general welfare laws, so too must the Arbitration Clause be rejected as unconscionably depriving participants of judicial enforcement of statutes and regulations developed precisely to protect citizens and visitors from dangers inherent in man-made swimming and amusement facilities.[25] For this additional and independently sufficient reason, the clause should be stricken.

But even if the Arbitration Clause were not against public policy, the voluntary and recreational nature of the Event would be just one of many factors for consideration in unconscionability analysis. This one factor would not vitiate the others described in this brief.[26] To the contrary, it would be substantially outweighed by them.

---

[25] Defendants' reliance upon *Saturn Dist. Corp. v. Williams*, 905 F.2d 719, 727 (4th Cir. 1990) is especially unpersuasive in this context. In *Saturn* the Fourth Circuit only held that a car dealer may simply choose not to do business with Saturn should it not care for the contractual dealership terms. The court never suggested that Saturn's dealership practices threatened the general health, safety and welfare of West Virginia citizens or that the arbitration clause in the Saturn dealership agreement would impede judicial scrutiny of conduct subject to important safety laws and regulations intended to protect the health and safety of our residents and visitors.

[26] Contrary to Defendants' suggestions, the unconscionable aspects of the Arbitration Clause are not cured by their "Severability" clause either. [App. 59]. Despite a so-called "Severability" clause, "[i]t is proper to decline to sever unconscionable provisions if the agreement is permeated with unconscionability." *Brown v. MHN Gov't Servs., Inc.*, 178 Wash.2d 258, 264, 306 P.2d 948, 952 (2013), citing *Armendariz v. Found. Health Psychare Servs., Inc.*, 24 Cal.4th 83, 124, 6 P.3d 669 (2000) (holding that the trial court did not abuse its discretion in concluding that the arbitration agreement was permeated by an unlawful purpose when there were two unconscionable provisions). "Such permeation can be indicated when there is no single provision a court can strike to remove the unconscionable taint," *id.*, or where the unconscionability cannot be cured by "severance alone." *Id.* at 275-76. The Supreme Court of Washington held an arbitration agreement unconscionable, including because it failed to specify "which set of AAA rules governs" arbitration, which cannot be cured by severance alone. *Id.* The court therefore refused to enforce the severability clause or arbitration agreement.

The approach taken by the Supreme Court of Washington (and by a California Court in *Armendariz*) is hardly unique. "[C]ourts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 674 (2007). "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Id.*, citing *Booker v. Robert Half Intn'l Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005). It is a "general principle . . . that it is not the function of the court to rewrite

For these additional reasons, the Arbitration Agreement is unconscionable and unenforceable.

7. If the Court Decides that the Arbitration Clause is Not Facially Unenforceable, Then Mrs. Sengupta Is Entitled to Discovery

As set forth above, the Arbitration Clause is facially unconscionable. But if the Court is not inclined to affirm the trial court's findings on this point, then Mrs. Sengupta requests a remand for further development of the record regarding unconscionability, including the collection of responses to her pending discovery requests served in April 2014. [App. 212-31]. As this Court has held, a plaintiff is entitled to discovery on "claims of coercion, fraud, or unequal bargaining power in the formation of an arbitration agreement" before an order compelling arbitration can be entered. *See Brown II,* 229 W. Va. at 395, 729 S.E.2d at 230 ("further development of the factual record by the parties is proper"); *see also id.,* 229 W. Va. at 392, 729 S.E.2d at 227 ("'[T]he particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others.'"); *Grayiel, supra,* 230 W. Va. at 104 (remanding for discovery).

---

contracts for parties." *Id.* (citation omitted). In *Simpson*, the Supreme Court of South Carolina held that an arbitration clause was unconscionable, because it limited statutory remedies in violation of public policy, and was overly one-sided. *Id.* at 28-36. The court therefore refused to enforce the severability clause or arbitration agreement. *Id.*

The Arbitration Clause at issue here suffers from these same problems of unconscionability and the many more described in this brief, particularly when the Arbitration Clause is viewed in context with the interrelated Venue and Jurisdiction and Indemnification Clauses. Accordingly, the same result pertains here: the Court should refuse to invoke a Severability Clause to reform an arbitration agreement permeated by unconscionability.

CONCLUSION

Plaintiff Mita Sengupta, as personal representative of the Estate of Avishek Sengupta, respectfully requests that this Court (i) affirm the trial court's memorandum and order in her favor on Count II (Declaratory Relief – Unenforceability of Arbitration Clause), declaring the Arbitration Clause at issue in this case unenforceable, and (ii) grant such further and other relief as it deems just and proper.

Respectfully submitted,

PLAINTIFF/RESPONDENT MITA SENGUPTA
AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF AVI SENGUPTA,
By her attorneys,

Robert P. Fitzsimmons (1212)
Clayton J. Fitzsimmons (10823)
FITZSIMMONS LAW FIRM PLLC
1609 Warwood Ave
Wheeling WV 26003
Phone: 304-277-1700
Fax: 304-277-1705
Email: bob@fitzsimmonsfirm.com
clayton@fitzsimmonsfirm.com

-and-

Robert J. Gilbert (Admitted *Pro Hac Vice*)
Edward J. Denn (Admitted *Pro Hac Vice*)
GILBERT & RENTON LLC
344 North Main Street
Andover, MA 01810
Phone: 978-475-7580
Fax:: (978) 475-1881
Email: rgilbert@gilbertandrenton.com
edenn@gilbertandrenton.com
[Of Counsel]

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TOUGH MUDDER, LLC; PEACEMAKER NATIONAL TRAINING CENTER, LLC; GENERAL MILLS, INC.; and GENERAL MILLS SALES, INC.;
Defendants/Petitioners,

v. No. 15-0114

MITA SENGUPTA, as Personal Representative of The Estate of Avishek Sengupta,
Plaintiff/Respondent.

AIRSQUID VENTURES, INC. (D/B/A AMPHIBIOUS MEDICS); and TRAVIS PITTMAN;
Defendants/Petitioners,

v. No. 15-0123

MITA SENGUPTA, as Personal Representative of The Estate of Avishek Sengupta,
Plaintiff/Respondent.

CERTIFICATE OF SERVICE

I, Robert P. Fitzsimmons, counsel for Plaintiff/Respondent, do hereby certify that service of the foregoing ***RESPONDENT MITA SENGUPTA'S CONSOLIDATED OPPOSITION BRIEF*** was had upon the following by sending a true copy thereof by regular, United States mail, postage prepaid, to their last known addresses this 24th day of June, 2015, as follows:

Honorable David W. Hummel Jr.
Judge of the Circuit Court of Marshall County
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041

Alonzo D. Washington Esq.
Christopher M. Jones Esq.
Flaherty Sensabaugh Bonaso PLLC
48 Donley Street
Suite 501
Morgantown, WV 26501

Robert N. Kelly Esq.
Michele L. Dearing Esq.
JACKSON & CAMPBELL, P.C.
1120 20th Street, N.W.
Suite 300 South
Washington, D.C. 20036

Robert P. O'Brien Esq.
Jennifer M. Sullam Esq.
Niles, Barton & Wilmer, L.L.P.
111 South Calvert Street, Suite 1400
Baltimore, MD 21202
Counsel for Petitioners Tough Mudder, LLC; Peacemaker National Training Center, LLC; General Mills, Inc.; and General Mills Sales, Inc.

David L. Shuman Esq.
Roberta F. Green Esq.
David L. Shuman Jr. Esq.
Shuman, McCuskey & Slicer P.L.L.C.
1411 Virginia Street East, Suite 200 (25301)
P.O. Box 3953
Charleston, WV 25339-3953

Robert C. Morgan Esq.
Morgan, Carlo, Downs & Everton, P.A.
Executive Plaza III, Suite 400
11350 McCormick Road
Hunt Valley, MD 21031
Counsel for Defendant, Airsquid Ventures, Inc. d.b.a. Amphibious Medics and Travis Pittman

Charles F. Johns Esq.
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330

Karen E. Kahle Esq.
STEPTOE & JOHNSON PLLC
1233 Main Street, Suite 3000
Wheeling, WV 26003
Counsel for Defendant, Travis Pittman

Respectfully submitted,

MITA SENGUPTA AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AVI SENGUPTA, ***Plaintiff/Respondent***

By her attorneys,

Robert P. Fitzsimmons (1212)
Clayton J. Fitzsimmons (10823)
FITZSIMMONS LAW FIRM PLLC
1609 Warwood Ave
Wheeling WV 26003
Phone: 304-277-1700
Fax: 304-277-1705
Email: bob@fitzsimmonsfirm.com
clayton@fitzsimmonsfirm.com

-and-

Robert J. Gilbert (Admitted *Pro Hac Vice*)
Edward J. Denn (Admitted *Pro Hac Vice*)
GILBERT & RENTON LLC
344 North Main Street
Andover, MA 01810
Phone: 978-475-7580
Fax: (978) 475-1881
Email: rgilbert@gilbertandrenton.com
edenn@gilbertandrenton.com
[Of Counsel]